***United States Court of Appeals***

***for the Second Circuit***


# BRIEF FOR APPELLANT

# 76-6163

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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SANTIAGO, GREGORY R.

Plaintiff,

-against-

SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE OF THE UNITED STATES,

Defendant.

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## APPELLANT'S BRIEF

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## PRELIMINARY STATEMENT

This is an appeal from a decision of John F. Dooling, District Judge, United States District Court for the Eastern District of New York, dated October 6, 1976. The decision has not been reported.

## ISSUES PRESENTED

1. Whether the Court below erred in not remanding the case for further administrative proceedings.

Appellant contends that it did.

## STATEMENT OF THE CASE

This is an appeal from a judgment and order of the District Court affirming the decision of the appellee Secretary of Health, Education and Welfare of the United States denying Social Security disability benefits to appellant.

## FACTS

Appellant Gregory Roman-Santiago was born March 12, 1933 in Puerto Rico. (Tr. 68.)* He has a sixth grade education. (Tr. 35.) He worked as a farm laborer and soldering machine operator prior to 1957. (Tr. 45-48.) In 1957 he began to work in the garment industry, and most recently worked as a cutter. (Tr. 31, 33.) He suffered a back injury in 1965 for which he received a Workmen's Compensation award of approximately $6000. (Tr. 31.) He returned to work, but on March 10, 1971, he fell and reinjured his back, and has not worked since that time. (Tr. 31-32, 33.) On January 10, 1973, he filed an application for a period of disability and for disability insurance benefits on the ground that back pain resulting from the March, 1971, injury prevents him from working. (Tr. 68-71.) The application was denied (Tr. 72-73) and the denial was affirmed on reconsideration. (Tr. 77.) Mr. Santiago requested an administrative hearing to review the application de novo. On the original hearing date, the hearing was adjourned to permit him to attempt to get a lawyer. (Tr. 16-20.) The hearing was reconvened on May 12, 1975. Present were the Administrative Law Judge ("ALJ"), Mr. Santiago, a Spanish interpreter, Rosa Maldonado, and a vocational expert, Arthur I. Bierman. (Tr. 14, 20.) When Mr. Santiago testified that he had been unable to obtain

*Citations are to the transcript of the record of the administrative proceedings, submitted herewith as an Appendix.

a lawyer, the ALJ decided to proceed without a lawyer. (Tr. 25.) Although the interpreter was present, most of the hearing was conducted in English, with part of the proceedings translated into Spanish. (Tr. 24, 29, 35-36, 37, 40, 43.)

Medical evidence in the record indicates that Mr. Santiago suffers from osteoarthritis, with mild anterior spurring of L3 and L4. (Tr. 119, 123, 126.) In 1972 and probably through October 12, 1973, there was muscle spasm and tenderness of the back muscles. (Tr. 110, 111, 112, 113, 117.) An examination performed by a consulting orthopedist, Dr. Irwin J. Nelson, on May 13, 1974, at the request of the Bureau of Disability Determination, found "no scoliosis, deformity, spasm or tenderness of the lumbosacral spine," but noted the osteoarthritis and a "slight restriction of rotation of the cervical spine." (Tr. 118-119.) A medical record from Kings County Hospital Center dated November 18, 1974, indicates that Mr. Santiago was still seeking treatment for back pain, and that treatment with "Electrolytes," Diuril, Reserpine, and Tylanol was prescribed. (Tr. 123.)

Two physicians, Dr. Paul Post on January 19, 1973, and Dr. Nelson on May 13, 1974, expressed the opinion that Mr. Santiago could work at jobs that did not involve bending or lifting. (Tr. 115, 119.)

Mr. Santiago testified that he was in constant pain.

(Tr. 33, 34, 36, 37, 55-56, 58.) He testified that he could climb a flight of stairs, with stops to rest, could carry about five pounds, and could walk two or three blocks, if he rested frequently, but that if he walked as far as four blocks, he had to spend the next day in bed. (Tr. 36-38.) He testified that medication had not done much to alleviate the pain, and that the principal relief he obtained was to lie down on the floor. (Tr. 34, 55-56.) He could not sit for more than an hour. (Tr. 35-36, 56.) He testified that in damp weather the pain was too severe to allow him to go out at all. (Tr. 56,64.)

The ALJ described Mr. Santiago's residual functional capacity as follows: "[H]e can climb [a] flight of stairs, carry five to ten pounds,...walk two to three blocks resting in between...sit for an hour...stand for an hour. Sometimes he's got a little trouble closing his hands." (Tr. 52.) Based on the residual capacity so set forth, and on Mr. Santiago's sixth-grade education and work history, the vocational expert, Mr. Bierman, testified that Mr. Santiago could do sedentary and light work, such as hand packer of small items, assembly work of small parts, or inspector or examiner; and that approximately 10,000 jobs in each category existed in the New York Metropolitan Area. (Tr. 52-53, 60-63.)

On May 14, 1975, the ALJ issued his decision. He

found that Mr. Santiago had met the special earnings requirements for disability purposes on March 10, 1971, the date of his second back injury, and that he would continue to meet them at least through September 30, 1975. However, he found that Mr. Santiago was not under a "disability" as defined in the Social Security Act, as amended, at any time on or before the date of the decision. He held that "the medical evidence herein does not show the existence of such impairments as to give rise to severe and unremitting pain in the back and in the extremities." (Tr. 6-12.)

The Appeals Council affirmed this decision on October 23, 1975. (Tr. 3.) The decision thereupon became the final decision of the Secretary of Health, Education and Welfare.

On December 18, 1975 appellant appealed to the United States District Court for the Eastern District of New York. On October 6, 1976 Judge Dooling denied appellant's motion for judgment and dismissed the action on the merits. It is from this decision that appellant now appeals.

## ARGUMENT

### THE COURT BELOW WAS IN ERROR IN NOT REMANDING THIS CASE FOR A NEW ADMINISTRATIVE HEARING

Judicial review by a federal district court of a final decision of the Secretary of HEW after a disability hearing is provided in 42 U.S.C. §405(g) as follows:

> "The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the case for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive...."

However, "This Circuit has observed that the Social Security Act is remedial or beneficent in purpose, and, therefore, to be 'broadly construed and liberally applied.'" Cutler v. Weinberger, 516 F.2d 1282, 1285, (2d Cir. 1975), quoting Gold v. Secretary of HEW, 463 F.2d 38, 41 (2d Cir. 1972). Therefore, where the ALJ has failed adequately to consider evidence in the record, or where, in the absence of counsel, the ALJ has failed to develop the evidence fully or has otherwise failed adequately to protect the interests of a claimant at a disability hearing, even though the Secretary's determination is "at least technically supported by substantial evidence..., courts have not hesitated to remand for the taking of additional evidence...." Cutler v. Weinberger,

supra, 516 F.2d at 1285; Gold v. Secretary of HEW, supra.

In the instant case, the record establishes that the ALJ failed to give adequate consideration and weight to evidence of the pain Mr. Santiago experienced, and failed in his duty to an unrepresented claimant to develop the evidence fully, to subpoena necessary witnesses, and adequately to cross-examine the vocational expert who testified as an expert witness. In view of these failures, the court below was in error in not remanding the case for a rehearing.

## POINT I

### THE ADMINISTRATIVE LAW JUDGE FAILED TO GIVE PROPER WEIGHT TO EVIDENCE OF APPELLANT'S SUBJECTIVE COMPLAINT OF PAIN

"Disability," for purposes of the Social Security Act, is the "inability to engage in substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months...." 42 U.S.C. §423 (d)(1)(A). "A 'physical or mental impairment' is an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. §423(d)(3).

There is no dispute that Mr. Santiago suffers from a lumbo sacral derangement, dating from his injury in 1971, and later diagnosed as osteoarthritis with spurring of two vertebrae, shown on radiographic examination September 13, 1973 and affirmed by Dr. Irwin Nelson on May 13, 1974. (Tr. 115, 119, 123, 126.) Thus, he suffers and has suffered since 1971 from a "medically determinable physical... impairment" within the meaning of the Act. The ALJ's decision, however, held that this impairment was not such "as to give rise to severe and unremitting pain in the back and in the extremities," (Tr. 10,) and that therefore Mr. Santiago was not and had

been under a disability as defined by the Social Security Act. In affirming, the Court below found that "there were no objective symptoms of moment...," (Decision of Judge Dooling, October 6, 1976) and failed even to mention the evidence in the record of Mr. Santiago's severe pain. Both the ALJ and the Court below relied heavily on the opinions of Drs. Post and Nelson that Mr. Santiago could do light work not involving lifting or bending. (Tr. 8-10, Decision of Judge Dooling.)

It is not clear from the ALJ's decision whether he disbelieved Mr. Santiago's testimony as to his pain, did not know whether to believe it or not, or believed it but in spite of his belief did not find the clinical medical diagnoses to be sufficiently serious to entitle Mr. Santiago to a finding of disability.

If the first hypothesis is true--that the ALJ simply disbelieved Mr. Santiago's testimony--then this was a finding by the ALJ on Mr. Santiago's credibility, and is determinative of the issue. If the second hypothesis is correct--that the ALJ did not know whether to believe Mr. Santiago or not--then he was obliged to seek further evidence on the question. See Point II, B, infra, pp. 21-22.

There is a hint in the record, however, that the third hypothesis is true--that the ALJ did believe the "pain testimony" but believed he could not make a finding of disability because, in effect, the average person with Mr. Santiago's degree of osteoarthritis would not suffer that disabling

degree of pain. For instance, during the testimony of the vocational expert, Mr. Santiago asked how a man with constant back pain could hold an assembly line job, in view of the fact that "the boss today--they want you working like animals --fast." The ALJ responded, "Well, that's a fair question," and attempted to elicit an answer from the vocational expert. (The question, however, was never answered. See infra, pp. 18-19.) (Tr. 53-55.)

If this hypothesis is the true one, then the ALJ's finding of no disability is contrary to the law both in this Circuit and elsewhere. In finding that an "impairment in fact causes an inability to 'engage in any substantial gainful activity...,' the abstract 'average' man is not the criterion. The inquiry must be directed to the particular claimant; not to people in general or even claimants in general." Burrell v. Finch, 308 F.Supp. 264, 266 (D. Kans. 1969).

> "While the medical reports may indicate that another person with plaintiff's symptoms probably would have suffered considerably less pain, '* * * it nevertheless amply supports * * * [his] complaint that in * * * [his] particular medical case these symptoms were accompanied by pain so very real to * * * [him] and so intense as to disable * * * [him]'....
>
> The Second Circuit has recognized that persons often have higher or lower thresholds of resistance to

> pain and, therefore, may react very differently to the same hardships." Spivak v. Gardner, 268 F.Supp. 366, 372 (E.D.N.Y. 1966), citing Ber v. Celebrezze, 332 F.2d 293 (2d Cir. 1964.)

Ber, supra, is the leading case in this Circuit on this issue, and is particularly pertinent to the instant case, dealing as it does with a diagnosis of "mild arthritis." Ber said,

> "The critical issue in this case was one which could not be resolved merely by determining what objectively observable physical changes had taken place in [appellant's] bone and muscle structure as a result of [his] arthritic condition, and then placing these observable changes alongside other similar changes in other persons so as to measure arthritic conditions on an imaginary scale with calibrations ranging from 'mild' to 'severe.' The ultimate question was whether the arthritic changes which had taken place in [appellant's] body did, in view of [his] individual physical and mental makeup, cause pain which became so intensely severe to [him] that...it forced [him] to" be unable to work. 332 F.2d at 298-299.

See also Rosa v. Weinberger, 381 F.Supp. 377 (E.D.N.Y. 1974). Thus, whatever degree of pain the "average" patient with osteoarthritis of the spine might suffer is irrelevant. Mr. Santiago's own experience of pain must be considered.

Here, there are clinical findings which support Mr. Santiago's testimony as to the pain he experiences. Pain

is, in fact, the chief subjective symptom of osteoarthritis. The Merck Manual of Diagnosis and Therapy, Holvey and Talbott, 1972, p. 1221. In addition, patients commonly "do not appear to be sick," and "the radiologic [x-ray] appearance correlates poorly with the clinical picture." Id. Thus both legal and medical doctrine direct that particularly heavy weight be given to this particular claimant's testimony as to his pain, in this particular case.

It is not clear whether the opinions of Drs. Post and Nelson that Mr. Santiago could do light work were based on their disbelief in the pain Mr. Santiago complained of, or on an assessment of the "average" patient's reaction to the degree of osteoarthritis which was diagnosed in Mr. Santiago. (It must be noted that, a fortiori, Dr. Post only saw Mr. Santiago on those days when his pain relented enough for him to go out; and that Dr. Nelson saw him only once.) In the absence of any testimony from these physicians as to the basis for their opinions, the heavy reliance on them by the ALJ was thus misplaced.

In disability cases, particularly where the claimant is unrepresented, courts have a duty "to examine meticulously the evidence no matter how burdensome that duty is because of the helter-skelter nature of the records in these [disability] cases." Mefford v. Gardner, 383 F.2d 748, 761 (6th Cir. 1972.) Because of Mr. Santiago's imperfect command of English, and

probably also because he had no attorney to assist him in marshalling and organizing his testimony, the evidence of the severity of his pain is scattered throughout the hearing (Tr. 33, 34, 36-38, 55-56, 58) and some corroboration is buried among the exhibits (Tr. 93, 101) and never alluded to in the hearing or the decision. But the evidence is there, and the ALJ was obliged to deal with it more adequately than he did. The Court below erred in not remanding this case with instructions to the ALJ to make a specific finding as to the credibility of Mr. Santiago's pain testimony, and, if he found it credible, to apply the Ber standard in determining whether the degree of pain testified to by Mr. Santiago indeed caused disability within the meaning of the Social Security Act.

## POINT II

### THE ADMINISTRATIVE LAW JUDGE FAILED IN HIS DUTY TO DEVELOP THE RECORD FULLY

It is the law in this Circuit that "where the disability benefits claimant is unassisted by counsel" as Mr. Santiago was at the hearing, "the administrative law judge has a duty '"scrupulously and conscientiously [to] probe into, inquire of, and explore for all the relevant facts...."' quoting Cutler v. Weinberger, supra, 516 F.2d at 1286, Gold v. Secretary of HEW, supra, 463 F.2d at 43, and Hennig v. Gardner, 276 F.Supp. 622, 624-625 (N.D. Tex. 1967). The Court below found that the ALJ met this duty:

> "The substantial question is whether the Administrative Law Judge was able to function fairly and effectively when he had to deal with a layman and with a language barrier of uncertain sort. It must be concluded that he was able to and did act fairly and effectively. He secured an interpreter of whom plaintiff did not complain. He gave plaintiff time to obtain a lawyer and plaintiff was unable to do so. The Administrative Law Judge then when ahead, and, particularly in his questioning of the vocational expert, showed manifest willingness and ability to sort out the facts." Decision of Judge Dooling, October 6, 1976.)

A careful examination of the record demonstrates, however that this analysis fails to deal adequately with at least four areas in which the ALJ failed to meet his duty to Mr. Santiago.

A. The ALJ failed adequately to examine the vocational expert. As a basis for the vocational expert's testimony as to jobs that Mr. Santiago might be able to do, the ALJ described Mr. Santiago's, "residual functional capacity" thus: "[H]e can climb [a] flight of stairs, carry five to ten pounds, ... walk two to three blocks resting in between ... sit for an hour ... stand for an hour. Sometimes he's got a little trouble closing his hands." (Tr. 52.) This description omits some important facts. First, with regard to the fact that Mr. Santiago cannot remain in either a sitting or a standing position for more than an hour at most, the examination proceeded as follows:

> "A. [By the vocational expert]. Hand-packing is usually by hand by definition.
> Q. And is it performed sitting?
> A. Yes sir.
> Q. Or in alternate sitting or standing positions?
> A. Sometimes on a chair, sometimes leaning, sometimes standing, whatever position the person wants." (Tr. 55.)

This last answer does not make it clear whether such a job would permit Mr. Santiago to alternate sitting and standing, an hour at a time, or whether he would be able initially to choose the position he preferred, and then be confined by the nature of his equipment or work space to that position. Proper examination of the vocational expert would have required him to answer that question. As it stands, his testimony is

not adequate to establish that Mr. Santiago could do this work, even with the residual functional capacity attributed to him by the ALJ.

Second, the bare statement that Mr. Santiago could "sit for an hour, stand for an hour" ignores the fact that, according to Mr. Santiago's testimony, most of the time he could neither sit nor stand with comfort. (Tr. 33, 34, 55-56, 58.) This testimony is corroborated by the observations of two different Social Security claims representatives who interviewed Mr. Santiago, one on January 10, 1973, and one on November 13, 1973, and who recorded the fact that he appeared to be in pain, and had difficulty in remaining seated. (Tr. 93, 101.)

The ALJ did attempt to deal with this issue in part at one point in the hearing:

> "CLAIMANT: Yes, what about the boss when they see you with pain in your back, and you will--who will get the job? Like who can get me a job like that?
> ADMINISTRATIVE LAW JUDGE: I don't know.
> CLAIMANT: That's what I mean because the boss today--they want you working like animals--fast. And that's what I mean.
> ADMINISTRATIVE LAW JUDGE: Well, that's a fair question.
> CLAIMANT: Yeah.
>
> BY ADMINISTRATIVE LAW JUDGE:
>
> Q. Mr. Bierman..., let me ask you this. We're dealing in jobs in the national economy on a competitive basis, are we not?

A. Yes sir.

* * *

Q. Could he with occasional pain in the back even when sitting--could he perform [hand packing and assembling] with the speed so far as you understand? In other words, what I'm saying is would pain from time to time--or can you tell us with the pain from time to time--would so inhibit him that he couldn't keep up with the other workers? Or can't you tell that from this record?" (Tr. 53-55.)

The vocational expert never answered this question. Instead he raised the question of whether Mr. Santiago was taking medication to alleviate the pain. The ALJ put the following question to Mr. Santiago:

"Q. Well, is the pain in your back relieved when you take Tylanol and other medications?
CLAIMANT: No, the pain in the back-- it relieves me when I lay down on the floor, you know, straight on the floor.
ADMINISTRATIVE LAW JUDGE: That's when it hurts?
CLAIMANT: No, that's when it stays-- it relaxes my body on--"(Tr. 55-56.)

The "fair question" of whether Mr. Santiago could in fact perform hand packing and assembling while in pain was thus left hanging and was never asnwered.

In fact, even if Mr. Santiago could have managed to perform those jobs while in pain, the Act would not oblige him to. "The notion that pain must be endured, that pain, no matter how severe or overpowering, is not disabling unless it

will substantially aggravate a condition, is contrary to the law under disability provisions of the Social Security Act which were intended to ameliorate some of the rigors that life imposes." Spivak v. Gardner, supra, 268 F. Supp. at 372, citing Miracle v. Celebrezze, 351 F.2d 361 (6th Cir. 1965).

Third, the vocational expert was never even asked what effect the need to lie down on the floor from time to time to relieve his pain would have on Mr. Santiago's ability to perform light and sedentary jobs.

Fourth, the ALJ and the vocational expert ignored Mr. Santiago's testimony that he was able to "sit for an hour, stand for an hour" only in dry weather; in bad weather the pain was so severe that he could not go out at all. (Tr. 56-58.) His testimony indicates that "maybe I can go [to work] two day a week or three day a week." (Tr. 64.) Two or three days of work a week does not amount to "substantial gainful activity," for a man with limited command of English and a sixth-grade education. "Employers are concerned with substantial capacity, psychological stability, and steady attendance." Thomas v. Celebrezze, 331 F.2d 541, 546 (4th Cir. 1964, emphasis added). "The fact that there are days when plaintiff could work, does not mean that the opportunity to do so is realistically available to him...." Spivak v. Gardner, supra, 268 F.Supp. at 372.

The Court below was thus in error in finding that the ALJ, "particularly in his questioning of the vocational expert, showed manifest willingness and ability to sort out the facts." (Decision of Judge Dooling.) The case should have been remanded for a proper examination of this witness.

B. The ALJ should have advised Mr. Santiago of his right to produce witnesses to corroborate his pain testimony. Mr. Santiago's back ailment is disabling because of the amount of pain it causes him. Because pain is by its nature subjective, the only person with direct knowledge of its existence is the person who experiences it--here, the claimant, Mr. Santiago. However, other witnesses can testify to observable effects of the pain: for exaple, Mr. Santiago's frequent changes from sitting to standing postures, his lying down on the floor at intervals, his frequent rests while walking. In such cases as this, such corroboration is of crucial importance in establishing a claimant's credibility. See, e.g., Cutler v. Weinberger, supra, 516 F.2d at 1285; De Paepe v. Richardson, 464 F.2d 92, 98, 99 (5th Cir. 1972). If Mr. Santiago had been represented by counsel, he would have been advised of the importance of calling corroborating witnesses. In the absence of "the guiding hand of counsel," the ALJ's "failure to call witnesses or to indicate that [appellant] ought to do so because he found [appellant's] testimony unpersuasive... provided [appellant] with less than a fair

hearing." Gold v. Secretary of HEW, supra, 463 F.2d at 43-44. The Court below erred in not remanding this case to permit Mr. Santiago to call such corroborating witnesses.

C. The ALJ should have subpoenaed Drs. Post and Nelson to testify at the hearing. Each of these doctors reported his opinion that Mr. Santiago was able to do light work which did not involve bending or lifting. (Tr. 115, 119.) It is true that the written report of an examining physician may constitute substantial evidence supporting a finding adverse to a claimant in a disability hearing, "when the claimant has not exercised his right to subpoena the reporting physician and thereby provide himself with the opportunity for cross-examination of the physician." Richardson v. Perales, 402 U.S. 389, 402 (1970). Here, Mr. Santiago was disputing these two medical reports. Both doctors should have been cross-examined as to the basis for their opinions that Mr. Santiago could work. Supra, p. 14. An attorney representing Mr. Santiago would have known of and requested the exercise of the ALJ's subpoena power to compel the attendance of these witnesses, which was certainly "reasonably necessary for the full presentation of [Mr. Santiago's] case...." 20 CFR §404.926. The record does not show that the ALJ informed Mr. Santiago of this possibility nor advised him to take advantage of it. Under these circumstances, the ALJ failed in his duty to the unrepresented claimant when he did not issue these

subpoenas on his own motion. Gold v. Secretary of HEW, supra, 463 F.2d at 43-44. The Court below erred in not remanding this case for the purpose of subpoenaing and cross-examining Drs. Post and Nelson.

D. The ALJ should have sought out evidence of psychological causes for Mr. Santiago's pain. The record indicates that if the ALJ did not seriously disbelieve Mr. Santiago's testimony as to his pain, he nevertheless believed that he was bound by the opinions of the orthopedists, Drs. Post and Nelson, that Mr. Santiago's arthritis was too mild to be disabling. An attorney for Mr. Santiago, faced with this conflict between the medical diagnosis and the actual pain, would immediately have suspected a possible psychological basis for the pain in addition to the medical finding of osteoarthritis. An experienced disability lawyer would have sought the expert opinion of a psychiatrist as to whether or not Mr. Santiago was suffering from a "conversion reaction" or "conversion hysteria"--a condition "characterized by the substitution of physical signs of symptoms for anxiety." Stedman's Medical Dictionary, 1972.

> "Such a condition is characterized by emotional distress and anxiety. The patient unconsciously produces physical symptoms to meet his psychological problem.... Since the physical symptoms are unconsciously produced, the patient himself sees no relation between his symptoms and the stress situation. This lack of intent to deceive distinguishes the

> conversion reaction from malingering, where the symptoms are consciously produced with intent to deceive.... It is primarily to the psychiatrist or psychoanalyst to whom we must turn ... for the 'medically acceptable clinical and laboratory diagnostic techniques.'" Hassler v. Weinberger, 502 F.2d 172, 176 (7th Cir. 1974).

See also Branham v. Gardner, 383 F.2d 614, 617 (6th Cir. 1967); Beggs v. Celebrezze, 356 F.2d 234 (4th Cir. 1966); Ber v. Celebrezze, supra, 332 F.2d at 299. In the absence of counsel, the ALJ should have noticed the likelihood of a conversion reaction and exercised his duty to explore for all the relevant facts by referring Mr. Santiago to a consulting psychiatrist for examination and diagnosis.

Thus, in his inadequate examination of the vocational expert, in his failure to inform Mr. Santiago of the advisability of obtaining corroborating witnesses, in his failure to subpoena and cross-examine Drs. Post and Nelson, and in his failure to follow up on the likelihood of a psychoneurotic element in Mr. Santiago's back pain, the ALJ's conduct of the hearing fell short of the duty which devolves on him when confronted by an unrepresented claimant for disability benefits. The Court below erred in not remanding this case for a rehearing in which all of these elements were fully explored.

## POINT III

### THE ALJ FAILED TO EXPLORE THE MEDICAL EVIDENCE THAT MR. SANTIAGO HAD BEEN DISABLED FOR A PERIOD OF A YEAR IMMEDIATELY AFTER HIS INJURY OCCURRED

Even assuming arguendo that the opinions of Drs. Post and Nelson, that Mr. Santiago could do light work at the time they examined him, were found to be valid, it must be noted that those opinions were recorded long after Mr. Santiago's injury on March 10, 1971. Dr. Post's opinion was expressed on January 19, 1973 (Tr. 115), and Dr. Nelson's even later, on May 2, 1974/ (Tr. 118). Thus, there remains a period of approximately 21 months prior to the date of Dr. Post's report during which there might have been a finding that Mr. Santiago was unable to work. In fact, in a report to the Workmen's Compensation Board of an examination on May 17, 1972, fourteen months after the accident, Dr. Post described Mr. Santiago as "partially disabled" and expressed no opinion as to when he "was or [would] be able to [r]esume limited work of any kind." (Tr. 113.)

Since, therefore, Dr. Post apparently believed that Mr. Santiago was sufficiently disabled to be unable to engage in "limited work of any kind" on that date, and no contradictary evidence appears in the record, it seems that Mr. Santiago was, at the very least, disabled within the meaning of the Act for the fourteen months between March 10, 1971

and May 17, 1972, and is entitled, at least, to retroactive benefits for that period. Dr. Post had been treating Mr. Santiago since April 15 or 16, 1971. (Tr. 110, 115.) The ALJ should have subpoenaed Dr. Post and his records, and sought his opinion as to Mr. Santiago's ability to work during the fourteen-month period immediately after the accident. The Court below erred in not remanding this case for a rehearing to explore this issue, as well as all those issues raised supra at pp. 10-24 .

## POINT IV

### APPELLANT WAS PREJUDICED BY HIS LACK OF COUNSEL

It is of course true that a claimant's right to due process is not violated by the mere absence of counsel at the hearing, absent a showing of prejudice resulting from that lack. See, e.g., Meola v. Ribicoff, 207 F.Supp. 658 (S.D.N.Y 1962). Even so, it has been observed,

> "...this Court and other federal courts have been troubled by this lack [of counsel], even in civil matters, where a litigant with an apparent just claim, needs a degree of sophistication in the presentation of evidence, cross-examination and a knowledge of the existing case law, the statute, and its legislative history, in order to present his case." Zeno v. Secretary of HEW, 331 F. Supp. 1095, 1096 (D.P.R. 1970).

It is abundantly clear from the record that Mr. Santiago, a manual laborer with a sixth-grade education and a shaky command of English, was seriously prejudiced by his lack of counsel. All those duties which the ALJ failed to perform, as described supra, pp. 10-24, would have been performed on Mr. Santiago's behalf by counsel. He would have been advised to produce corroborating witnesses; subpoenas of Drs. Post and Nelson would have been sought; cross-examination of those doctors and of the vocational expert would have been conducted; psychiatric evaluation would have been obtained; the

correct legal standard for assessing the pain testimony would have been urged. In short, with competent counsel, Mr. Santiago would have had the full and fair hearing to which he was entitled and which he did not get.

Although in a sense Mr. Santiago agreed to go ahead with the hearing without a lawyer, it cannot be said that he knowingly and freely waived his right to counsel. He had made an effort to get a lawyer. (Tr. 18-20, 21, 24-25.) Through no fault of his own, but apparently because of the overload of case work in the Legal Aid and Legal Services offices, he was unsuccessful. (Tr. 24-25.) The ALJ did not inform Mr. Santiago that the Social Security Administration provides for the payment of a private lawyer out of any retroactive benefits a claimant may receive as a result of a favorable hearing decision. 20 CFR §404.975. Instead, he said,

> "You know what we're going to do? We're going to proceed without a lawyer. How do you like that? And if you don't like my decision--if it's against you, you can write a piece a paper [sic].
>
> We'll tell you about it later. And you go to the Appeals Council in Washington. All you got to do is sign a piece of paper. And if you don't like what they do, you can go to the District Court; and if I know what the law is, if you don't have a lawyer, they're going to reverse me, no matter what happens if I come down against you.
>
> So,--especially in the Eastern District of New York. So, you got nothing to lose. Let's go ahead

with the hearing. Shall we?" (Tr. 25.)

No answer from Mr. Santiago appears in the record. It is obvious that he believed that his choice was between having a hearing without a lawyer and having no hearing at all, and that he had "nothing to lose" by going ahead with the hearing. Under the circumstances, his going ahead pro se cannot be called a knowing waiver of his right to counsel.

In any case, Mr. Santiago is now represented by counsel. In view of the defects in the hearing discussed in this brief, the Court below erred in not remanding this case for a rehearing at which Mr. Santiago would have the assistance of counsel.

## CONCLUSION

For all the above reasons, this Court should reverse the decision of the Court below, and order that this case be remanded for a rehearing, at which Mr. Santiago will be represented by counsel and in which all the issues discussed herein will be fully dealt with.

Dated: December 13, 1976
Brooklyn, New York

Gretchen L. Sprague

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Attorney for Appellant

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK )
: ss.:
COUNTY OF KINGS )

Gretchen L. Sprague, being duly sworn, deposes and says:

That deponent is not a party to the action, is over 18 years of age and resides at 1150 East 29th Street, Brooklyn, New York.

That on the 14th day of December, 1976, deponent served the within

Appellant's Brief

on each addressee listed below, being the address designated by said attorney for that purpose, by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office Department within New York State, addressed to:

Michael Cavanagh, Esq.
Assistant U.S. Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Gretchen L. Sprague
Gretchen L. Sprague

Sworn to before me this 14th
day of December, 1976

Vyvonne Lewis
NOTARY PUBLIC

V. VONNE LEWIS
Notary Public, State of New York
No. 31-4518340
Qualified in New York County
Commission Expires March 30, 1978